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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 ROBERT MASON,

12 Petitioner,

13 v.

14 JAMES WALKER, Warden,

15 Respondent.

CASE NO. 09-CV-1551-JM (JMA)

**ORDER GRANTING IN PART
AND DENYING IN PART
CERTIFICATE OF
APPEALABILITY**

Doc. No. 13

16 On October 5, 2010, this court issued an order denying the above-entitled petition for
17 writ of habeas corpus with prejudice. (Doc. No. 10.) Petitioner now requests a certificate of
18 appealability in order to appeal the court's ruling. (Doc. No. 13.)

19 **I. BACKGROUND¹**

20 On September 21, 2005, Petitioner Robert Mason was convicted by a jury of
21 committing battery resulting in serious bodily injury in violation of CAL. PENAL CODE
22 § 243(d). He was sentenced under the state's "Three Strikes Law" to an indeterminate term of
23 twenty-five years to life, with two five-year enhancements added based on two prior serious
24 felony convictions. Petitioner's sentence was affirmed by the California Court of Appeal, and
25 his petition for review was subsequently denied by the California Supreme Court.

26 Petitioner went on to file a petition for writ of habeas corpus in state court, which was
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28 ¹ All of the relevant background facts are drawn from the Magistrate Judge's Report
and Recommendation, Doc. No. 9.

1 denied at all levels.

2 On July 15, 2009, Petitioner Robert Mason filed the instant petition for writ of habeas
3 corpus in federal court. Petitioner's filing raised four claims for relief: (1) that the trial court
4 abused its discretion by refusing to strike a prior felony conviction from 1990; (2) that he was
5 denied his right to effective assistance of counsel in entering his plea agreement in that same
6 1990 felony case; (3) that the trial court abused its discretion when it denied his Faretta motion;
7 and (4) that the trial court abused its discretion when it denied his motion for a mistrial based
8 on the revelation of Petitioner's prior incarceration by a trial witness. Of the four claims, only
9 the first two were previously raised by Petitioner in his state habeas petitions.

10 On August 5, 2010, Magistrate Judge Adler issued a Report and Recommendation
11 (hereafter "R&R") in Petitioner's case, recommending that his petition be denied with
12 prejudice. The magistrate judge's conclusion was based on the grounds that the petition was
13 time-barred by the one-year statute of limitations set forth in the Antiterrorism and Effective
14 Death Penalty Act of 1996 (hereafter "AEDPA"). Specifically, in situations such as
15 Petitioner's, AEDPA requires that federal habeas petitions be filed within one year of the date
16 on which direct review of the underlying state conviction was concluded. (28 U.S.C.
17 § 2244(d)(1).) Here, direct review of Petitioner's § 243(d) conviction concluded on
18 June 12, 2007, ninety days after the California Supreme Court denied his petition for review.
19 (See SUP. CT. R. 13(1); Bowen v. Roe, 188 F.3d 1157, 1159-60 (9th Cir. 1999).) Therefore,
20 the AEDPA statute of limitations in Petitioner's case expired on June 12, 2008. Petitioner's
21 federal habeas petition was not filed until June 9, 2009. The magistrate judge further concluded
22 that neither statutory nor equitable tolling was sufficient to justify the delay in filing.

23 After reviewing the magistrate judge's analysis, this court adopted the R&R in full and
24 dismissed the petition for writ of habeas corpus with prejudice. Petitioner now seeks to appeal
25 the court's decision, and requests that the court issue a certificate of appealability ("COA") in
26 his case. (Doc. No. 13.)

27 **II. LEGAL STANDARD**

28 Under AEDPA, an appeal from a final order in a habeas corpus proceeding may not be

1 taken “[u]nless a circuit justice or judge issues a certificate of appealability.” (28 U.S.C.
 2 § 2253(c)(1).) However, such a certificate may only issue “if the applicant has made a
 3 substantial showing of the denial of a constitutional right.” (28 U.S.C. § 2253(c)(2).)

4 The “substantial showing” requirement imports essentially the same standard as that
 5 announced by the Supreme Court in Barefoot v. Estelle, 463 U.S. 880 (1983) for the issuance
 6 of certificates of probable cause. (Lambright v. Stewart, 220 F.3d 1022, 1024 (9th Cir. 2000).)
 7 In order to satisfy this “modest standard,” “the petitioner ‘must demonstrate that the issues are
 8 debatable among jurists of reason; that a court could resolve the issues [in a different manner];
 9 or that the questions are adequate to deserve encouragement to proceed further.’” (Id. at 1024-
 10 25 (quoting Barefoot, 463 U.S. at 893 n.4) (emphasis in original).)

11 However, “[t]he issue . . . ‘becomes somewhat more complicated where . . . the district
 12 court dismisses the petition based on procedural grounds.’” (Id. at 1026 (quoting Slack v.
 13 McDaniel, 529 U.S. 473, 484 (2000)).)

14 In those situations, the court must engage in a two-part Barefoot inquiry. First,
 15 the court must decide whether “jurists of reason would find it debatable whether
 16 the petition states a valid claim of the denial of a constitutional right.” Second,
 the court must decide whether “jurists of reason would find it debatable whether
 the district court was correct in its procedural ruling.”

17 (Id. (quoting Slack, 529 U.S. at 484).) If both these requirements are met, then a right to appeal
 18 should be granted and a COA must issue.

19 **III. DISCUSSION**

20 **A. Whether Jurists of Reason Would Find It Debatable Whether the Petition** 21 **States a Valid Claim of the Denial of a Constitutional Right**

22 The first part of the two-part inquiry described above requires the court to examine the
 23 alleged constitutional deprivations underlying the petition. However, in determining whether
 24 Petitioner has stated a valid (or debatably valid) constitutional claim, the court is limited by
 25 a lack of evidence on the record before it. At the time the R&R was adopted, Petitioner had
 26 made no substantive filings beyond his initial petition, and no evidentiary hearings were
 27 conducted in the matter. The Ninth Circuit has held that, in such cases, the court should
 28 “simply take a ‘quick look’ at the face of the complaint to determine whether the petitioner has

1 ‘facially allege[d] the denial of a constitutional right.’” (Id. (quoting Jefferson v. Wellborn, 222
2 F.3d 286, 289 (7th Cir. 2000) (alterations in original).) In making this assessment, all of
3 Petitioner’s factual allegations are assumed to be true, and all reasonable inferences drawn in
4 his favor. (Id. at 1026 n.5.)

5 Petitioner alleges four separate constitutional violations in his petition: First, he claims
6 that the state trial court abused its discretion in denying his motion to strike a prior felony
7 conviction under People v. Superior Court (Romero), 13 Cal. 4th 497 (1996). (Doc. No. 1 p.7.)
8 According to Petitioner, the trial court demonstrated an unfair bias against Petitioner based on
9 its perception that Petitioner had a history of violence with women, thereby depriving
10 Petitioner of his right to due process. (Id.) Second, Petitioner alleges he was denied his right
11 to effective assistance of counsel under the Sixth Amendment in that same prior felony case,
12 when his attorney failed to investigate evidence of Petitioner’s innocence and did not inform
13 Petitioner that a guilty plea in that case could be counted as a strike against him under
14 California’s “Three Strikes” law. (Id. at p.8; see also CAL. PENAL CODE § 667.) Third,
15 Petitioner claims he was denied his Sixth Amendment right to self-representation under
16 Faretta v. California, 422 U.S. 806 (1975), when the trial court denied his motion as untimely
17 without sufficiently inquiring into when Petitioner had made his request. (Doc. No. 1 pp. 7, 9.)
18 Finally, Petitioner claims that the trial court abused its discretion by denying his motion for a
19 mistrial based on a trial witness’s revelation of Petitioner’s prior incarceration. (Id. at pp. 8-9.)
20 Petitioner argues that permitting the trial to go forward even after the jury had heard this
21 testimony in violation of a previous evidentiary ruling deprived him of his Fourteenth
22 Amendment rights. (Id.)

23 On their face, all four of Petitioner’s allegations state valid claims for constitutional
24 deprivations. Constitutional due process generally guarantees criminal defendants “[a] fair trial
25 in a fair tribunal.” (In re Murchison, 349 U.S. 133, 136 (1955).) Thus, the right to due process
26 may be violated both by the presence of judicial bias (id.) as well as by improperly introduced
27 evidence or statements at trial (Darden v. Wainwright, 477 U.S. 168, 179 (1986)). In addition,
28 the Sixth Amendment’s right to counsel has been interpreted to include both a right to the

1 effective assistance of counsel during the plea process (Hill v. Lockhart, 474 U.S. 52, 57
 2 (1985)) and the right to self-representation (Faretta, supra, 422 U.S. at 821.) Thus, all four of
 3 Petitioner's claims satisfy the first part of the Lambright test.

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 5 **B. Whether Jurists of Reason Would Find It Debatable Whether the District Court was Correct in Its Procedural Ruling**

6 The court must next determine whether the correctness of its procedural ruling—here,
 7 that Petitioner's claims were time-barred by AEDPA's statute of limitations—is reasonably
 8 debatable. It is undeniable that the instant petition was filed more than one year after
 9 Petitioner's conviction became final: The California Supreme Court denied a petition for direct
 10 review of Petitioner's underlying conviction on March 14, 2007. However, a state court
 11 criminal judgment is only considered "final" upon expiration of the ninety-day period in which
 12 a defendant can file a petition for writ of certiorari from the United States Supreme Court.
 13 (Bowen v. Roe, supra, 188 F.3d at 1159-60.) Thus, for AEDPA's purposes, the statute of
 14 limitations on Petitioner's case began to run on June 12, 2007. The instant petition was filed
 15 in federal court on June 9, 2009, almost two years later. Therefore, whether the court's
 16 procedural ruling is debatably correct depends upon an examination of whether statutory or
 17 equitable tolling could have applied to excuse Petitioner's delay in filing.

18 **1. Statutory tolling**

19 AEDPA specifically permits tolling of its one-year limitations period during the time
 20 in which "a properly filed application for State post-conviction or other collateral review . . .
 21 is pending." (28 U.S.C. § 2244(d)(2).) However, this statutory tolling period applies, if at all,
 22 to Petitioner's first and second claims only, which were the only claims raised by petitioner
 23 in his state habeas petition.

24 Here, Petitioner first filed his state habeas petition with the Superior Court of California,
 25 County of San Diego, on August 27, 2007, 76 days after the expiration of his AEDPA
 26 limitations period. The Superior Court denied the petition on November 1, 2007, and Petitioner
 27 filed a new petition 356 days later in the California Court of Appeal on October 22, 2008.
 28 After the Court of Appeal also denied his petition on November 20, 2008, Petitioner filed

1 another petition with the California Supreme Court 8 days later on November 28, 2008. The
2 California Supreme Court denied that petition on June 10, 2009.²

3 The Ninth Circuit has interpreted a state post-conviction application to be “pending”
4 within the meaning of AEDPA “during the period between (1) a lower court’s adverse
5 determination, and (2) the prisoner’s filing of a notice of appeal, *provided that* the filing of the
6 notice of appeal is timely under state law.” (Waldrip v. Hall, 548 F.3d 729, 734 (9th Cir. 2008)
7 (emphasis in original).) In California, subsequent petitions to higher courts seeking review of
8 an adverse lower court decision are considered “timely” when “filed within a ‘reasonable
9 time.’” (Evans v. Chavis, 546 U.S. 189, 192-93 (2006) (quoting Carey v. Saffold, 536 U.S.
10 214, 221 (2002)).) What constitutes a “reasonable time” in which to file for appellate review
11 is to be determined, in the first instance, by the state courts themselves. (Banjo v. Ayers, 614
12 F.3d 964, 968 (9th Cir. 2010).) However, where the state courts are silent as to the issue of
13 timeliness, the federal court “must itself examine the delay in each case and determine what
14 the state courts would have held.” (Chavis, *supra*, 546 U.S. at 197.)

15 In this case, the magistrate judge concluded, and this court agreed, that the 356-day
16 delay between the Superior Court’s denial of Petitioner’s state habeas petition and the re-filing
17 of the petition with the Court of Appeal was unreasonable. The magistrate judge’s
18 recommendation was based on various Supreme Court and Ninth Circuit cases, which found
19 that AEDPA statutory tolling was not justified in other cases for delays of similar or shorter
20 length. However, the question of what is a “reasonable” time for delay is one that necessarily
21 lends itself to debate amongst “jurists of reason.” Therefore, the correctness of this court’s
22 procedural ruling to dismiss the instant petition is debatable within the meaning of Barefoot,
23 and Petitioner should be permitted an opportunity to appeal the court’s determination with
24 regard to his first and second claims.

25 2. Equitable tolling

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27 ² Under the California system, a prisoner seeking collateral review of his conviction
28 in state court appeals a lower court’s adverse determination by filing an original petition for
habeas corpus with the appellate court. (See Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir.
2010).)


1 “[E]quitable tolling of AEDPA’s one-year statute of limitations is available in [the
2 Ninth Circuit], but only when ‘extraordinary circumstances beyond a prisoner’s control make
3 it impossible to file on time.’” (Espinoza-Matthews v. California, 432 F.3d 1021, 1026 (9th
4 Cir. 2005) (quoting Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003)).) A prisoner arguing
5 for equitable tolling “bears the burden of showing that [it] is appropriate” in his case. (Id.
6 (quoting Gaston v. Palmer, 417 F.3d 1030, 1034 (9th Cir. 2005)) (internal quotation marks
7 omitted).) Here, as the magistrate judge correctly points out, Petitioner has neither argued that
8 equitable tolling should apply nor made any showing that his situation meets equitable tolling’s
9 strict requirements. Therefore, there can be no debate as to the court’s determination that
10 equitable tolling is inapplicable to Petitioner’s case.

11 **IV. CONCLUSION**

12 Petitioner seeks to appeal this court’s dismissal of his petition for writ of habeas corpus,
13 which was founded on four separate and distinct claims. “Jurists of reason” could debate the
14 correctness of this court’s decision to deny statutory tolling on the first and second claims;
15 however, it is incontrovertible that neither statutory nor equitable tolling applies to Petitioner’s
16 third and fourth claims. Therefore, the court hereby GRANTS IN PART and DENIES IN
17 PART Petitioner’s request. A certificate of appealability is granted as to Petitioner’s first
18 claim—regarding the trial court’s denial of his Romero motion—and second claim—regarding
19 denial of his Sixth Amendment right to effective assistance of counsel during the plea
20 proceedings in his prior 1990 felony case. The request is otherwise denied as to Petitioner’s
21 third and fourth claims.

22 **IT IS SO ORDERED.**

23 DATED: January 12, 2011

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25 Hon. Jeffrey T. Miller
United States District Judge
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